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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE BEDFORD FALLS COMPANY et al., Plaintiffs and Appellants, v. FIREMAN'S FUND INSURANCE COMPANY, Defendant and Respondent.	B208352 (Los Angeles County Super. Ct. No. BC370792)

APPEAL from a judgment of the Superior Court of the County of Los Angeles. Yvette M. Palazuelos, Judge. Affirmed.

Dickstein Shapiro, Kirk A. Pasich, Cassandra S. Franklin and Julia K. Holt for Plaintiffs and Appellants.

Hager & Dowling and John V. Hager for Defendant and Respondent.

Plaintiffs, the Bedford Falls Company, a partnership, and two of its partners, Edward Zwick and Marshall Herskovitz, appeal from the judgment of dismissal entered after the superior court sustained defendant Fireman's Fund Insurance Company's demurrer to plaintiffs' second amended complaint (SAC) without leave to amend. The SAC contained three causes of action -- breach of contract, bad faith, and declaratory relief--arising out of defendant's refusal to defend or indemnify plaintiffs against a suit for copyright infringement and related claims. We affirm the judgment, because the allegations of the SAC, together with provisions of defendant's policy attached to the SAC and judicially noticed facts to which there was no objection, established that there was no duty to defend or indemnify plaintiffs, and plaintiffs did not suggest any possibility of amending.

FACTS AND STATEMENT OF THE CASE

1. The SAC

The SAC is the only version of plaintiffs' pleading before us. Plaintiffs filed their first amended complaint after a demurrer to the original complaint had been noticed. The record does not include the prior versions of the complaint, but the trial court's ruling herein recites that the court had previously granted defendant's demurrer to the first amended complaint with leave "because the parties' contract was not attached to the pleading."

Plaintiffs comprise a film and television production company and two of its partners, who are film writers, producers, and directors. Plaintiffs alleged that they obtained annual "producers errors and omissions" liability policies from defendant. The original policy term was April 22, 2002 to April 22, 2003, followed by successive annual renewal polices, the last policy term ending on April 22, 2006. On information and belief, plaintiffs alleged that each of the policies contained similar forms and language. Plaintiffs further alleged that for each renewal, defendant did not issue a new policy, but instead, "provided only pieces of the policy and certain endorsements."

The declarations page accompanying the 2005-2006 policy recited that the policy was being renewed "SUBJECT TO THE ORIGINAL TERMS AND CONDITIONS THEREOF AND AS SUBSEQUENTLY ENDORSED, EXCEPT FOR THE CONDITIONS OF THE FOLLOWING FORMS AND ENDORSEMENTS ATTACHED AT RENEWAL: [listing documents]." Plaintiffs incorporated the declarations page and attached documents to the SAC as Exhibit A.

Plaintiffs also incorporated a copy of the Blanket Errors & Omissions Producers Liability Insurance Policy and attached it as Exhibit B. They alleged on information and belief, that Exhibit B contained the terms of the 2005-2006 policy. Plaintiffs further alleged that under that policy, defendant was obligated to defend and indemnify plaintiffs against entertainment claims for, *inter alia*, copyright infringement and breach of an implied or implied-in-fact contract "arising out of the alleged submission of literary, dramatic, musical or other similar material, or breach of trust and confidence arising out of such submission." This insurance applied to claims first asserted against the insured and reported by the insured during the policy term.

The 2005-2006 policy contained several endorsements. A "Distributors E & O Blanket Endorsement" (hereinafter, the "distributors endorsement") provided that for there to be coverage of claims or proceedings "brought in connection with any particular production," the insured had to submit, and the insurer had to approve, a written application including a title search report "prior to the distribution." It recited that the premium reflected on the declaration page was only the "Minimum Annual Premium," and that "[f]or each production insured by this policy, there shall be an additional premium, in the following amounts." The distributors endorsement contained immediately below this reference two separate blank spaces, each preceded by a dollar sign, entitled "Purely fictional productions" and "All other productions," respectively; both lines were blank.

A second endorsement (hereinafter referred to as the "green light endorsement") stated in full: "Coverage under this policy does not apply to any film project once it is

'Green Lit' (90 day prior to principal photography) and we shall have no obligation to defend or indemnify any claims made against this policy after a project is green lighted."

Plaintiffs alleged that one of the motion picture productions insured under the above policies was *The Last Samurai*. They further alleged that on December 5, 2005, plaintiffs were sued in federal district court for, among other causes of action, copyright infringement, breach of implied contract, and breach of confidence, involving *The Last Samurai* (hereinafter the "*Benay*" case). Plaintiffs were served with the complaint on February 2, 2006, and they notified defendant and requested a defense on or about February 9, 2006.

On May 10, 2006, defendant denied plaintiffs' tender of defense and indemnification in *Benay*. (Defendant's letter denying coverage was attached as Exhibit D to the SAC.) Defendant asserted that because one of the two *Benay* plaintiffs had made a "potential claim" in 2002 that plaintiffs had not reported during the 2002 or 2006 policy term, there was no coverage under an exclusion for "[a] claim made or suit, action or proceeding commenced against the insured or of which the insured received notice, either prior to or subsequent to the term of this policy."

Plaintiffs alleged in the SAC contractual and tortious breaches in defendant's failure to investigate thoroughly before denying coverage; failure to assume plaintiffs' defense while investigating coverage; failure timely and specifically to advise plaintiffs why coverage was being denied; and improper interpretation of the above policy exclusion to apply to a mere "potential claim." Plaintiffs also alleged that only after they filed the instant suit on May 9, 2007, and only after defendant demurred to the first amended complaint, did defendant raise the green-light endorsement as a bar to coverage.

They alleged, on information and belief, that this endorsement was not part of the 2005-2006 policy "as delivered to Bedford Falls in 2005." Finally, even if the green light endorsement had been in that policy, it did not apply because defendant (1) failed to reference it in its letter denying coverage; (2) failed "appropriately" under California law and industry custom, to warn plaintiffs of the time limitation imposed in the green light endorsement, and the "severe" limitation it placed on the period of coverage afforded by

the policy; and (3) interpreted the green light provision in an "artificially broad and improper manner," which effected an "early cancellation of the policy before the end of its specified period" thus rendering the coverage illusory.

Plaintiffs further averred that "[t]o the extent that this purported exclusion operates as FFIC contends, it is contrary to the express terms of the 'California Cancellation and Nonrenewal' endorsement because it constitutes, in effect, an early cancellation of the policy before the end of its specified policy period, it renders coverage illusory . . . , and FFIC failed to . . . return, any premium paid with respect to *The Last Samurai* for the period after it contends coverage ceased, even though Bedford Falls paid a premium for the full policy term."

In addition to compensatory damages, plaintiffs sought attorney fees under *Brandt v. Superior Court* (1985) 37 Cal.3d 813, and punitive damages. Finally, plaintiffs sought declaratory relief regarding coverage for defense and indemnity in *Benay*.

2. The Demurrer.

Defendant argued that the face of the SAC and its attached and incorporated exhibits revealed that by virtue of the green light endorsement, there was no coverage for defense and indemnity costs incurred in *Benay*, and that plaintiffs failed to plead around this fatal defense to all the causes of action in their SAC. More specifically, because *The Last Samurai* was not separately scheduled in the distributors endorsement, the green light endorsement applied. Because *The Last Samurai* was first published on December, 5, 2003, simple logic dictated that the film was green lighted before December, 5, 2003, and thus, there could be no coverage under the 2005-2006 policy for the claims asserted in *Benay*. Defendant further asserted that the green light endorsement is unambiguous, and that under *Waller v. Truck Insurance Exchange, Inc.* (1995) 11 Cal.4th 1, its failure to cite that provision in its letter denying coverage did not constitute a waiver of the benefits of that endorsement or an estoppel against asserting the endorsement in the demurrer.

Plaintiffs did not allege in the SAC when *The Last Samurai* was completed or first published. To establish those dates, defendant requested judicial notice of plaintiffs'

responses to defendant's requests for admissions and form interrogatories and of a January 16, 2004 certificate of registration in the United States Copyright Office, filed by Warner Bros. Entertainment. The certificate recited that *The Last Samurai* had been completed in 2003, and first published in the United States and Canada on December 5, 2003. In its responses to defendant's form interrogatories, plaintiffs admitted that *The Last Samurai* was released in the United States on December 5, 2003. Plaintiffs did not object to these requests for judicial notice in the trial court, and do not here.

In their opposition, plaintiffs retorted that the green-light endorsement was not dispositive because they alleged a "dispute" as to the content of the policy terms by alleging that when plaintiffs renewed for the 2005-2006 time period, defendant provided only "portions of the policy, but not the complete policy." The trial court had to accept the allegation of that "dispute" as true. Plaintiffs further argued that the green light endorsement was not plain and conspicuous, and that the demurrer had to be overruled to allow plaintiffs to conduct discovery to develop extrinsic evidence of ambiguity. Plaintiffs did not proffer their own interpretation of the green light endorsement. Plaintiffs further contended that defendant waived reliance on that endorsement by failing to assert it in its letter denying tender of the defense in *Benay*. Defendant also did not consider whether there was coverage under any of defendant's other policies in place during the April 22, 2002-April 22, 2005 time period.

Even if the green light endorsement precluded coverage, plaintiffs argued that their allegations of defendant's failure to investigate and timely and properly notify plaintiffs of the green light limitation were sufficient to ground a bad faith claim. In the event that the trial court sustained the demurer, plaintiffs requested leave to amend. Finally, plaintiffs rebuffed defendant's demurrer to the declaratory relief claim because that cause of action was only alleged against the DOE defendants. In light of that representation, defendant withdrew its demurrer to that cause of action.

Defendant rejoined in its reply papers that absent coverage, there can be no bad faith claim. Defendant reiterated that the green light endorsement was not ambiguous and clearly precluded coverage for the claims in *Benay*, nor did defendant waive the

ability to assert that endorsement. Because the prior policies were also "claims-made and reported" policies, they did not provide coverage for *Benay*, which was filed only on December 5, 2006. Defendant urged the trial court not to grant leave to amend again because plaintiffs had not demonstrated that they could plead a viable claim, and had already been given the opportunity to do so when the court granted the demurrer to the first amended complaint.

3. The Hearing and the Trial Court's Ruling on the Demurrer

The argument focused principally on the distributors endorsement, and defense counsel's assertion that to obtain the coverage plaintiffs were seeking in the SAC, plaintiffs would have had to pay additional premiums. They did not do so as evidenced by the blank lines preceded by dollar signs on the endorsement itself. For the same reason, the pre-green light coverage that plaintiffs purchased was not illusory.

In response to the court's questions as to whether it had the complete policy, defense counsel drew the trial court's attention to the declarations page in Exhibit A for the 2005-2006 policy, which indicates that it was a renewal "SUBJECT TO THE TERMS OF THE ORIGINAL TERMS AND CONDITIONS THEREOF AND AS SUBSEQUENTLY ENDORSED," and told the court that the distributors endorsement at issue here was expressly attached to the declarations page. Defense counsel then reiterated why taken together, the distributors and green light endorsements demonstrated no possibility of coverage of the claims in Benay under any policy in effect during the April 22, 2002-April 22, 2006 time period.

The trial court issued its written ruling and granted the demurrer without leave to amend. The court recognized the legal principle requiring courts to defer to a plaintiff's reasonable interpretation of a contract in ruling upon a demurrer. The trial court found that the distributors and green light endorsements, nonetheless, precluded coverage for defense and indemnity costs in *Benay* because the blank lines on the distributors endorsement evidenced that plaintiffs had chosen not to purchase post-green light coverage, and *The First Samurai* had been green lighted well before inception of the 2005-2006 policy term. Plaintiffs never objected to the court's taking judicial notice of

their verified discovery responses or the copyright registration. The court also expressly noted that plaintiffs' counsel conceded that she did not have any version of the distributors endorsement with filled-in lines reflecting additional premium payments. Finding that the absence of coverage was fatal to all plaintiffs' causes of action, the trial court sustained the demurrer without leave to amend.

DISCUSSION

On appeal, plaintiffs advance the same arguments that they made to the trial court in opposing the demurrer to the SAC. Because we find that (1) the SAC revealed a complete defense to all plaintiffs' causes of action; (2) plaintiffs failed to plead around that defense; and (3) plaintiffs did not proffer any ability to amend other than generally requesting discovery to develop extrinsic evidence, we affirm.

We review the sustaining of the demurrer de novo. A demurrer is not an evidentiary hearing. In ruling upon a demurrer, the court is confined to the four corners of the complaint, any attached exhibits, and matters properly judicially noticed. (*Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505.) The court may take judicial notice of the pleader's inconsistent verified discovery responses to the extent that they contradict the complaint and they relate to matters within the pleader's personal knowledge. (*Bockrath v. Aldrich Chemical Co., Inc*. (1999) 21 Cal.4th 71, 86.) The court must accept all factual allegations as true, but does not have the "accept the truth of contentions or conclusions of fact or law." (*Barnett* at p. 505.) If factual allegations conflict with the content of exhibits attached to the complaint, the court must "accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits." (*Ibid.*)

The exhibits to the SAC revealed a complete defense. They demonstrated that plaintiffs had paid only the Minimum Annual Premium under the producers endorsement, and that under the green light provision, their coverage was limited to the pre-green light time period. Judicial notice of plaintiffs' own discovery responses and the copyright registration for *The Last Samurai* further revealed the completion date for that film, which was before inception of the April 22, 2005-April 22, 2006 policy term. Plaintiffs

never objected to the trial court's judicial notice of these documents and do not do so here.

Similarly, as to defendant's other annual policies in effect during the April 22, 2002-April, 22, 2005 time period, the SAC and attached exhibits revealed that plaintiffs never made or reported the claims in *Benay* during any of those policy periods. At oral argument, plaintiffs cited to defendant's reference in its denial letter to plaintiffs' knowledge of a potential claim by one of the *Benay* plaintiffs in December, 2002 to argue that the SAC revealed that plaintiffs reported that claim during the 2002 policy period. That assertion is a logical non-sequitur and contradicts plaintiffs' allegation in the SAC that they had no notice of any of the *Benay* claims before April 22, 2005.

Plaintiffs further argue that the court had to accept their allegation of coverage under the 2002-2006 policies as true. Plaintiffs are incorrect; that hornbook principle applies only to factual allegations and not legal conclusions. The same is true for plaintiffs' argument that the trial court had to accept their allegation that coverage was "continuous" from April 22, 2002 through April 22, 2006.

Plaintiffs next argue that the court had to accept their allegation of an unidentified "dispute" as to the terms of the 2005-2006 policy, and that only "portions," and not the complete copy, of that policy were delivered to them when they renewed the policy in 2005. Once again, plaintiffs' allegation is inconsistent with the exhibits attached to the SAC, which exhibits prevail over any inconsistent, conclusory allegations in the SAC.

The declarations page expressly recited that the 2005-2006 policy was being "RENEWED FOR THE TERM OF THIS CERTIFICATE, SUBJECT TO THE ORIGINAL TERMS AND CONDITIONS THEREOF AND SUBSEQUENTLY ENDORSED, EXCEPT FOR THE CONDITIONS OF THE FOLLOWING FORMS AND ENDORSEMENTS ATTACHED AT RENEWAL[]." Plaintiffs did not allege that when they first obtained insurance in 2002 from defendant, they did not receive the original policy referenced in the declarations page. They do not dispute that one of the endorsements expressly attached to the declarations page was the very distributors endorsement at issue here. Indeed, plaintiffs pled that the terms of the 2006-2006 policy

were set forth in Exhibits A and B. Under the demurrer principles summarized above, plaintiffs' unadorned allegation of a "dispute" does not dictate reversal.

Plaintiffs assert that the green light endorsement is ambiguous, but offer no alternative, let alone reasonable interpretation. Although courts must defer to a pleader's reasonable interpretation of a contract in considering a demurrer (*Aragon-Haas v. Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232, 239), plaintiffs never suggested any alternative interpretation of the green light endorsement to the trial court and have yet to do so here.

Plaintiffs argue that they provided a reasonable alternative interpretation when they alleged that to accept defendant's interpretation of the green light endorsement would be contrary to the express terms of the California Cancellation and Nonrenewal endorsement[1] because it would work, "in effect, an early cancellation of the policy before the end of its specified policy period." This argument begs the question of what coverage was provided in the first place. Defendant interprets the policy to cover only the pre-green light period; plaintiffs still fail to posit any competing interpretation.

Plaintiffs' assertion that even if the SAC revealed a complete contractual defense, it was error to sustain a demurrer before plaintiffs conducted discovery to find extrinsic evidence of ambiguity. This too is of no avail when plaintiffs never suggested any alternative interpretation.

Plaintiffs contend that *Mobil Oil Corp. v. Exxon Corp* (1986) 177 Cal.App.3d 942, compels a different conclusion. It does not. There, plaintiffs suggested an alternative interpretation of arbitration provisions, which they argued were ambiguous. Because the trial court did not defer to that reasonable interpretation, but instead, substituted its own

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[1] That endorsement recites that it is "**added to the CANCELLATION Common Policy Condition**" for "POLICIES IN EFFECT FOR MORE THAN 60 DAYS," and lists those acts or conduct occurring after the effective date of the policy that could cause cancellation of the policy, for example, nonpayment of premium, certain misrepresentations by the insured, a court judgment having as one of its "necessary elements" an act that materially increases "any of the risks insured against," and the like.

interpretation in granting a motion for judgment on the pleadings on plaintiffs' contract claims, the appellate court reversed. It was in this context that the appellate court observed that "[a]n opportunity should have been given to introduce extrinsic evidence to assist the court in interpreting and applying the arbitration provisions to the facts of this case." (*Id*. at p. 948.) In addition, plaintiffs here had opportunity to conduct discovery, as evidenced by the trial court's judicial notice of discovery that defendant propounded, and the passage of time between plaintiffs' original complaint and their third iteration in the SAC.

Nor does *Southern Pacific Transportation Co. v. Santa Fe Pipelines, Inc.* (1999) 74 Cal.App.4th 1232 come to plaintiffs' rescue. That case did not present the issue of whether it was error to grant a demurrer without leave to amend when the pleader requests discovery to find extrinsic evidence to support an ambiguity argument. In that rent valuation case, the appellate court reversed a judgment reached after trial where the court "refused to engage in any interpretation of the agreements to determine the formula for establishing rent, let alone consider extrinsic evidence pertinent to the question." (*Id*. at p. 1235.)

For the same reasons, we find that the trial court did not abuse its discretion in denying leave to amend. Plaintiffs have had three opportunities to plead viable causes of action and have not demonstrated any possibility of amending despite having had many opportunities to do so. (*Goodman v. Kennedy* (1976) 18 Cal. 3d 335, 349 ["Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading."].)

Plaintiffs' efforts to disregard the green light endorsement are equally unpersuasive. Defendant's omission of the green light endorsement in its letter denying coverage did not constitute a waiver or estoppel against asserting that provision in defendant's demurrer. (*Waller v. Truck Ins. Exchange*, *supra*, 11 Cal.4th at p. 31 ["We conclude that an insurer does not impliedly waive coverage defenses it fails to mention when it denies the claim."]; *Manneck v. Lawyers Title Ins. Corp.* (1994) 28 Cal.App.4th

1294, 1303 ["[C]overage under an insurance policy cannot be established by estoppel or waiver."].)

The same is true for plaintiffs' assertion of an estoppel arising from defendant's alleged failure to warn plaintiffs that coverage was limited to the pre-green light time period. (*Manneck v. Lawyers Title Ins. Corp., supra,* 28 Cal.App.4th 1294, 1303 [""""'The rule is well established that the doctrines of implied waiver and of estoppels, based upon the conduct or action of the insurer, are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom . . . .'""""].) Nor did plaintiffs allege the essential element of knowing relinquishment for a waiver claim or detrimental reliance for an estoppel claim, or proffer any possibility of doing so to support a request for leave to amend.[2] The quality, size and format of the text of the green light endorsement also belie plaintiffs' claim that defendant failed to make it conspicuous, plain, and clear.

Finally, where there is no coverage, no claim for bad faith exists. "Thus, when benefits are due an insured, delayed payment based on inadequate or tardy investigations, oppressive conduct by claims adjusters seeking to reduce the amounts legitimately payable and numerous other tactics may breach the implied covenant because it frustrates the insured's *primary* right to receive the benefits of his contract — i.e., prompt compensation for losses. Absent that primary right, however, the *auxiliary* implied covenant has nothing upon which to act as a supplement, and should not be endowed with an existence independent of its contractual underpinnings." (*Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1153, original emphasis.)

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[2] Plaintiffs cite *Spray, Gould & Bowers v. Associated Internat. Ins. Co.* (1999) 71 Cal.App.4th 1260, for the proposition that an insurer may be estopped from asserting a contract limitations defense if it did not disclose all "time limits" under Section 2695.4 of the Fair Claims Settlement Practices Regulations. We express no opinion on whether the green light endorsement would be a "time limit[]" under Section 2695.4 because unlike in *Spray, Gould* — plaintiffs failed to plead detrimental reliance and did not argue that they could amend to plead such detrimental reliance.

Plaintiffs argue that their allegations that defendant failed to investigate properly, "among other bad faith acts" are sufficient to support a bad faith claim even absent coverage. Plaintiffs rely principally on *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225 for this proposition. Plaintiffs misread *Brehm*. The grant of the demurrer in that case was reversed because, among other reasons, the trial court believed that an express contractual term had to be breached before a bad faith claim would lie. Unlike here, there was no issue in *Brehm* whether there was coverage in the first place. In the words, of the *Brehm* court: "[t]he principle that no breach of the covenant of good faith and fair dealing can occur if there is no coverage or potential for coverage under the policy is quite different from the argument that no breach of the implied covenant can occur if there is no breach of an express contractual provision . . . ." (*Brehm, supra,*166 Cal.App.4th at p.1236.)

DISPOSITION.

The judgment is affirmed. Defendant shall recover costs.

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BENDIX, J.*

We concur:

FLIER, Acting P. J.

BIGELOW, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.